

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

Plaintiff,

V.

FRANCISCO SALGADO MARTINEZ,

Defendant.

No. CR-11-6071-FVS

ORDER DENYING MOTION TO  
DISMISS INDICTMENT

**THIS MATTER** came before the Court on December 2, 2011, for oral argument on Defendant's Motion to Dismiss the Indictment. (ECF No. 25). Assistant United States Attorney Alison L. Gregoire appeared on behalf of the United States. Defendant was present and represented by Alison K. Guernsey.

## BACKGROUND

On October 12, 2011, Defendant was charged by indictment in this district with being an Alien in the United States After Deportation in violation of 8 U.S.C. § 1326. (ECF No. 14). Defendant asserts that the indictment in the instant matter should be dismissed because the underlying deportation violated his due process rights. (ECF No. 26).

## DISCUSSION

## I. Collateral Attack on Predicate Conviction

An alien charged with a § 1326 violation may collaterally attack a "deportation order that constituted an element of a criminal offense." *United States v. Herrera-Blanco*, 232 F.3d 715, 718 (9th Cir. 2000). To prevail on a collateral attack, an alien must show (1)

1 that the underlying deportation proceeding violated his right to due  
2 process and (2) that he was prejudiced by the violation. *Id.*

3 The validity of the underlying deportation may be collaterally  
4 attacked in this criminal proceeding.

5 **II. Due Process**

6 Defendant argues that the deportation order upon which the  
7 instant prosecution is premised was obtained in violation of his right  
8 to due process. (ECF No. 26 at 4). Defendant contends his conviction  
9 for "Child Molestation in the Third Degree" in violation of Wash. Rev.  
10 Code § 9A.44.089, the offense which resulted in his 2001 deportation,  
11 was not an "aggravated felony," and, therefore, he was not deportable  
12 on that ground. *Id.*

13 The Government responds that recent case law supports a finding  
14 that third-degree child molestation under Washington state law is  
15 categorically a crime of child abuse. *See Jimenez-Juarez v. Holder*,  
16 635 F.3d 1169 (9th Cir. 2011). The Government asserts that, as a  
17 result, Defendant's 2001 conviction qualifies as an aggravated felony  
18 under federal law.

19 To determine whether a particular prior conviction constitutes an  
20 aggravated felony, the Court applies the categorical approach: it  
21 looks only to the statutory definition of the prior convicted offense.  
22 *See Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012-1013 (9th Cir. 2009).

23 The statute of conviction in this case, Third-Degree Child  
24 Molestation under Wash. Rev. Code § 9A.44.089, provides as follows:

25 (1) A person is guilty of child molestation in the third degree  
26 when the person has, or knowingly causes another person under the  
age of eighteen to have, sexual contact with another who is at  
least fourteen years old but less than sixteen years old and not

1       married to the perpetrator and the perpetrator is at least forty-  
2       eight months older than the victim.

3       Wash. Rev. Code § 9A.44.089. For purposes of this Washington state  
4       statute, "sexual contact" is defined as "any touching of the sexual or  
5       other intimate parts of a person done for the purpose of gratifying  
6       sexual desire of either party or a third party." Wash. Rev. Code §  
7       9A.44.010.

8       The Ninth Circuit has formulated two generic definitions of  
9       "sexual abuse of a minor" for use in the categorical approach.  
10      *Pelayo-Garcia*, 589 F.3d at 1013-1014. "[A] state offense will be a  
11      categorical match for 'sexual abuse of a minor' if it fits either  
12      definition." *United States v. Farmer*, 627 F.3d 416, 421-422 (9th Cir.  
13      2010).

14      The first generic definition of sexual abuse of a minor has four  
15      elements: "(1) a mens rea level of knowingly (as to engaging in the  
16      act); (2) a sexual act; (3) with a minor between the ages of 12 and  
17      16; and (4) an age difference of at least four years between the  
18      defendant and the minor." *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147,  
19      1152 (9th Cir. 2008) (parenthetical added). With regard to this first  
20      generic definition, a "sexual act" is defined as: contact between the  
21      genitals or between the genitals or the anus, contact between the  
22      mouth and the genitals or anus, penetration of the genitals or anus  
23      with intent to abuse, humiliate, harass, degrade, or arouse; or  
24      intentional skin-to-skin touching of the genitals of one under  
25      sixteen. 18 U.S.C. § 2246(2).

26      Wash. Rev. Code § 9A.44.089's definition of "sexual contact" is  
broader than the federal definition. The generic federal definition

1 requires, at a minimum, skin-to-skin touching. See *United States v.*  
 2 *Castro*, 607 F.3d 566, 570 (9th Cir. 2010). Wash. Rev. Code §  
 3 9A.44.089, however, criminalizes touching through the clothing. See,  
 4 e.g., *State v. Soonalole*, 99 Wash.App. 207, 214 (2000) (affirming  
 5 conviction for Third-Degree Child Molestation when the defendant  
 6 fondled the victim's breasts and rubbed her thighs over her clothes).  
 7 Because a defendant could be convicted under Wash. Rev. Code §  
 8 9A.44.089 without engaging in a "sexual act" as federally defined,  
 9 Wash. Rev. Code § 9A.44.089 is categorically broader than this first  
 10 generic definition of sexual abuse of a minor.<sup>1</sup>

11 The second generic definition of sexual abuse of a minor contains  
 12 three elements: "(1) sexual conduct; (2) with a minor; (3) that  
 13 constitutes abuse." *Castro*, 607 F.3d at 568 (citing *United States v.*  
 14 *Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009)). Wash. Rev. Code §  
 15 9A.44.089 clearly contains the first two elements of this second  
 16 generic definition of sexual abuse of a minor, sexual conduct with a  
 17 minor. Those elements are not in dispute. However, the parties  
 18 disagree as to whether Wash. Rev. Code § 9A.44.089 requires the third  
 19 element, abuse.

20 The Ninth Circuit has concluded that "[a] criminal statute  
 21 includes the element of 'abuse' if it expressly prohibits conduct that  
 22 causes 'physical or psychological harm' in light of the age of the  
 23

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24       <sup>1</sup>The Government's response indicates that this federal  
 25 definition of sexual abuse of a minor involves statutory rape  
 26 crimes, not sexual crimes against minors involving abuse. (ECF  
 No. 36 at 4 n. 2). The Government agrees that Wash. Rev. Code §  
 9A.44.089 is categorically broader than this generic definition  
 of sexual abuse of a minor. *Id.*

1 victim in question." *Pelayo-Garcia*, 589 F.3d at 1014 (quoting *United  
2 Medina-Villa*, 567 F.3d at 513). Sexual conduct involving younger  
3 children is per se abusive. See *United States v. Baron-Medina*, 187  
4 F.3d 1144 (9th Cir. 1999).

5 In *Jimenez-Juarez*, the Ninth Circuit recently held that a  
6 conviction for third-degree child molestation under Wash. Rev. Code §  
7 9A.44.089 constitutes a "crime of child abuse" within the meaning of 8  
8 U.S.C. § 1227(a)(2)(E)(i). The Court determined that the act of  
9 sexual touching of a 14- or 15-year old victim by one who is at least  
10 48 months older constitutes, at a minimum, "maltreatment of a child  
11 and impairs the child's mental well-being." *Id.* at 1171. The Ninth  
12 Circuit thus found that such conduct amounts to "abuse".

13 The Court determines that Defendant's Washington conviction for  
14 Third-Degree Child Molestation under Wash. Rev. Code § 9A.44.089  
15 qualifies under the second generic definition of "sexual abuse of a  
16 minor." Defendant's April 20, 2001 deportation did not violate  
17 Defendant's right to due process. Accordingly, Defendant's 2001  
18 deportation may be used to form the basis for a § 1326 conviction in  
19 this matter.

20 The Court being fully advised, **IT IS HEREBY ORDERED** Defendant's  
21 Motion to Dismiss the Indictment (**ECF No. 25**) is **DENIED**.

22 **IT IS SO ORDERED.** The District Court Executive is hereby  
23 directed to enter this order and furnish copies to counsel.

24 **DATED** this 6th day of December, 2011.

25 \_\_\_\_\_  
26 S/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge